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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1262

ALBERT G. AVERY,

Petitioner,

vs.

ROBERT W. OWENS, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, OF THE NEW YORK SUPREME COURT

RICHARD STEEL,
61 Broadway,
New York, N. Y. 10006,
Attorney for Petitioner.

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, OF THE NEW YORK SUPREME COURT

Petitioner prays that a Writ of Certiorari issue addressed to the Appellate Division of The New York Supreme Court, First Judicial Department, to review its final order made on January 27, 1966.

Opinions Below

The opinion and order of the Special Term of The New York Supreme Court is not reported but is set forth in the Appendix, pp. 1-2a. There was no opinion in the Appellate Division.

Jurisdiction

The order of the Appellate Division was made and entered on January 27, 1966; its order denying petitioner's

application for leave to appeal to the New York Court of Appeals was made and entered on March 29, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3), 62 Stat. 929.

Questions Presented

Petitioner wrote six letters to transfer agents of stock in his family trust and one to the administrator of the estate of the deceased trustee seeking to rescind stock transfers effected by respondent as attorney for an adverse trust claimant to his client, and to maintain the status quo pending a judicial determination of the claimant's rights therein. When sued by respondent for libel by innuendo, for general and punitive damages only in the sum of $1,050,000.00, petitioner accordingly pleaded the complete defense of qualified privilege which, under New York law, can only be overcome by proof of "actual" malice. Subsequently petitioner was given leave by the Special Term of the New York trial court to plead the further complete defense of the collateral estoppel of a prior decision and judgment in a judicial proceeding between petitioner and respondent's client, wherein respondent was her attorney, based upon these very letters, and determining that petitioner had acted under a color of right to protect a fund in which he had an interest from what he believed to be improper administration and wrongful distribution. Nevertheless the Special Term and Appellate Division denied petitioner's motion for summary judgment on the alleged ground this defense raised triable "issues". The Appellate Division then denied petitioner's motion for leave to appeal to the New York Court of Appeals, despite the federal Constitutional claim, seasonably asserted, that this determination deprived petitioner of his rights under the First and Fourteenth Amendments. The following questions thus are presented:

1. Was petitioner deprived of his rights under the First and Fourteenth Amendments, in a suit de-

pending upon libel by innuendo only, to which the complete defense of qualified privilege was interposed and admittedly was applicable, where respondent, in opposing summary judgment, submitted no evidence of actual malice or damage and plaintiff's proof negated the existence of such malice?

2. Was petitioner denied due process of law under the Fourteenth Amendment by the refusal of the state courts to hold that the prior determination he had acted under color of right to protect a fund in which he had an interest in publishing the letters conclusively negated the existence of actual malice?

Statutes or Constitutional Provisions Involved

The First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment; the Due Process Clause of the Fourteenth Amendment; New York Civil Practice Law and Rules, Sec. 5602(b)1 (Laws of 1962, ch. 308, Sec. 5602) precluding review by the New York Court of Appeals without leave of the Appellate Division.

Statement of the Case

Following termination of a family *inter vivos* trust in Vermont, of which petitioner is a vested remainderman, on December 7, 1962 on the death of the last income beneficiary and also the sole trustee (petitioner's mother, Mrs. Josephine G. Avery), the trust bookkeeper, Emilie B. Bender, who had access to the trust safe deposit box in Vermont, appointed her New York attorney, the respondent Owens, her "deputy" on December 20, 1962 (70). On December 24th respondent entered the Vermont box, removed all the trust securities and cash, then worth

upwards of $158,000, to New York City and set about transfering one third thereof to his client Bender, knowing that petitioner was then claiming she had released any interest in the trust by an instrument under seal executed November 29, 1939 of which she had delivered a duplicate to petitioner (9-10). The bearer bonds and cash passed by delivery, the trust stocks, all registered in the name of the deceased trustee, were assigned by respondent's clients, Bender and Katherine A. Feuerlicht, allegedly as trustees under a 1939 trust deed amendment appointing them trustees "in event" of the death of the then sole trustee, Josephine G. Avery, *supra*, at a time when her husband Brainard was also a life income beneficiary (19).

There is a settled body of law[1] that there can be no "trustees" of a trust after it has vested, terminated and ceased to exist; that if, as here, the sole trustee is then also deceased the duties of accounting, winding up and distribution devolve upon her personal representative, in this case the Vermont administrator of her estate, and no one else. Petitioner reasonably relied upon this law and believed, in consequence, that the only lawful and sensible construction of the 1939 trust amendment, *supra*, was to provide "trustees" to continue an active trust for the remaining lifetime of the income beneficiary, Brainard Avery, "in event" the then sole trustee, Josephine, predeceased him, an "event" that did not occur since he died in 1947 and she in 1962 (62-3). The letters complained of made all this abundantly clear (Complaint, Exs. A-G incl. Appendix, pp. 24-36a). Respondent admittedly never disclosed Bender's instrument of release of November 29, 1939, *supra*, to the transfer agents in

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[1] See *Friedley* v. *Security Trust & Safe Deposit Co.*, 10 Del. Ch. 74, 84A, 883; *Matter of Luckenbach*, 267 App. Div. 275, aff'd 292 N. Y. 674; 1 *Restatement: Trusts* (2nd ed.) Sec. 104, p. 233; 1 *Perry: Trusts* (3rd ed.) Secs. 264, 269, 344.

securing the transfers of trust stocks into her name (10, 50-1), nor does he claim to have disclosed this rule of law.

On learning of the transfers early in January, 1963 petitioner wrote six of the letters complained of to the respective transfer agents, setting forth the foregoing in great detail, quoting from or inclosing copies of the Bender release, demanding that the transfers to her be rescinded and that the status quo be preserved until litigation to resolve all these questions could be begun in the Chancery Court of Vermont where the trust had its only situs, seat of administration and domicile of the sole trustee over the last twenty-two years of its existence (10; see *Avery* v. *Bender et al.*, 124 Vt. 309, 204 A 2d 314). On February 20, 1963 he wrote the seventh letter to the Vermont administrator, stressing the latter's duties and responsibilities in the forthcoming litigation, begun eight days later and still pending, wherein the Vermont Supreme Court has held the administrator was an indispensable party (*id.*, cf. *Hanson* v. *Denckla,* 357 U. S. 235).

Four months later, in June, 1963, respondent, as attorney for Bender and Feuerlicht, instituted a proceeding in the New York Supreme Court, wherein the Vermont administrator was not joined (cf. *Hanson* v. *Denckla, supra*), seeking, among other things, to enjoin petitioner from interfering with his clients as "trustees" by publishing the letters and proceeding with the prior Vermont suit (*Matter of Feuerlicht etc.* v. *Avery,* 28-9). A motion to dismiss for lack of jurisdiction of the subject matter was made and denied at Special Term and the denial affirmed without opinion by the Appellate Division (*id.*, 19 A. D. 2nd 862). Issue was then joined and all issues were sent to a Special Referee to hear and determine them (12). At the trial on February 5, 1964 petitioner testified for his clients on the "interference" issue and the seven letters in question and *also* the libel complaint, verified only three weeks earlier, were placed in evidence (12-13).

Ten months later, on December 7, 1964, the Special Referee filed his decision wherein he found that petitioner, in publishing these letters, and others,

> "* * * had acted under some color of right, to protect a fund in which he had an interest from what he believed to be improper administration and wrongful distribution." (68)

Final judgment on this decision was entered on December 16, 1964 by petitioner's attorneys (31-3). It "denied" respondent's prayer for injunctive relief, on the merits, and is now final (33).

Petitioner was then granted leave in the libel suit to amend his answer and plead, in addition to the complete defense of qualified privilege, previously pleaded, the complete collateral estoppel of this prior decision and judgment as conclusively negating the existence of any actual malice (3). On the pleadings, as thus amended, petitioner then moved for summary judgment dismissing the libel complaint, pursuant to New York CPLR Sec. 3212.[2] The Special Term, by its order and decision of July 20, 1965, denied the motion on the ground this defense raised triable "issues", including the "extent" of the Referee's finding, *supra*, and the "role" of respondent as an attorney of record (31) in the prior litigation (3-4). On January 27, 1966 the Appellate Division, First Department, affirmed without opinion; on March 29, 1966 it denied, without opinion, petitioner's application for leave to appeal to the New York Court of Appeals, thus denying him review by the state court of last resort. Under New York state practice an appeal from affirmance of a denial of summary judgment by the Appellate Division does not lie, as of right, to the Court of Appeals, even if a federal

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[2] The New York state equivalent of FRCP 56.

Constitutional question is directly presented[3] (CPLR Sec. 5602 (b) 1, *supra*).

Meanwhile, on February 21, 1966 this Court decided *Linn* v. *United Plant Guard Workers of America*, 383 U. S. ——, 34 USLW 4136, 4139, holding:

> "We therefore limit the availability of state remedies for libel to those instances in which a complainant can show that defamatory statements were circulated with malice and caused him damage."

And on March 21, 1966, Mr. Justice Douglas, concurring in *Memoirs of a Woman of Pleasure* v. *Massachusetts*, 383 U. S. ——, 34 USLW 4236, 4240-1, said:

> "We faced the difficult questions the First Amendment poses with regard to libel in *New York Times* v. *Sullivan*, 376 U. S. 254, 269, where we recognized that 'libel can claim no talismanic immunity from constitutional limitations', * * * But the First Amendment, written in terms that are absolute, deprives the State of any power to pass on the value, the propriety or the morality of a particular expression" (citing cases).

See also Mr. Justice Black, dissenting in *Rosenblatt* v. *Baer*, 383 U. S. ——, 34 USLW 4111, 4118, decided February 21, 1966. The *Linn*, *New York Times* and *Rosenblatt* decisions were all duly brought to the attention of the Appellate Division in support of petitioner's federal Constitutional claim as Point II of his brief on final submission of petitioner's application for leave to appeal to the New

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[3] *Cohen & Karger: Powers of the New York Court of Appeals* (revised), p. 251: "Interlocutory or intermediate determinations are not appealable as of right, even if a constitutional question is directly presented" (*Paige* v. *Squier*, 254 N. Y. 551; *Smith* v. *La Guardia*, 368 N. Y. 632; *Matter of Greenwald* v. *Finnegan*, 272 N. Y. 509).

York Court of Appeals on March 15, 1966; the opinion in *Memoirs, supra,* had not then been handed down (Appendix pp. 4-5a; cf. *Lynum* v. *Illinois,* 368 U. S. 908).

Reasons for Granting the Writ

I

It is well settled that there are only four main categories of privilege applicable to libel suits: (1) absolute immunity or indefeasible privilege protecting communications pertaining to judicial proceedings; (2) qualified or defeasible privilege; (3) publication of official reports; (4) fair comment (1 *Harper & James; The Law of Torts* (1956 ed.), Sec. 5.21, pp. 419-20). Consequently the New York Court of Appeals has held that in cases involving either the alleged libel of a public official or qualified privilege generally, where actual malice must be established to overcome the privilege, it is incumbent on the plaintiff, in opposing a defendant's motion for summary judgment dismissing the complaint, to come forward with proof of actual malice, otherwise there is no triable issue and the complaint must be dismissed. (*Shapiro* v. *Health Ins. Plan,* 7 N. Y. 2d 56; *Sheridan* v. *Crisona,* 14 N. Y. 2d 108; *Schneph* v. *New York Post Corp.,* 16 N. Y. 2d 1011). In this Court this requirement has been squarely based upon federal Constitutional grounds (*New York Times* v. *Sullivan, supra,* 376 U. S. 254; *Henry* v. *Collins,* 380 U. S. 356; *Linn* v. *United Plant Guard Workers of America, supra,* 383 U. S. ——, 34 USLW 4136, 4139).

In two of the above New York cases, *Shapiro* and *Sheridan, supra,* the Special Term, as here, denied summary judgment on the ground there were triable issues as to the existence of actual malice, the Appellate Division, Second Department, as here, affirmed without opinion but *then* granted leave to appeal to the Court of Appeals where the decision was reversed and the complaint dismissed for lack of any actual proof of such malice. Petitioner could not

reasonably anticipate here that the Appellate Division, First Department, would ignore these controlling precedents and thus deny him review by the state court of last resort, particularly after the federal Constitutional question posed by the decisions above cited had been called specifically to its attention. Thus it is plain that petitioner has been discriminated against by the circumstance that respondent filed his libel suit in the First Judicial Department (where he has his office) rather than in the Second (where he resides)[4] and that petitioner's rights under the First and Fourteenth Amendments have suffered in consequence.

Admittedly the letters in question passed solely between parties having a lawful business interest in their subject matter. Thus they were within the broad definition of qualified privilege laid down in *Cheatum* v. *Wehle,* 5 N. Y. 2d 585, 595, 599, followed in *Shapiro, supra.* Indeed the only opposition to summary judgment at all was an affidavit of respondent's (plaintiff's) counsel, stating (47):

> "The plaintiff has repeatedly stated and states again that he made no objection to defendant's assertion of his claims and what he believed to be his rights, however erroneous or unjustified they might have been * * *. This libel action was not predicated upon the assertion of his contentions, but was based solely upon the libelous material that he unnecessarily inserted in the letters he wrote."

However, the complaint pleads only alleged libel by innuendo (App., 15-23a), not libel *per se,* and it is well settled that

> "The kind of malice necessary to defeat the protection of the privilege has nothing to do with the

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[4] The Appellate Division of the New York Supreme Court is divided into four judicial departments. The New York City boroughs of Manhattan and Bronx only are in the first department, the remaining boroughs are in the second department.

> 'malice' that is said to be 'presumed' from the publication of false and defamatory matter. Such fictitious 'malice' is rebutted by the circumstances that create a privilege. The malice must be real and genuine" (1 *Harper & James, op. cit., supra,* Sec. 5.27, p. 451).

Thus the power to "presume" malice merely from publication

> "* * * is not a means of escape from constitutional restrictions (*Bailey* v. *Alabama,* 219 U. S. 219, 239); the showing of malice is not presumed but is a matter of proof by plaintiff." (*New York Times* v. *Sullivan, supra,* 376 U. S. 254, 284 and cases cited.) Libel "can claim no talismanic immunity from constitutional limitations" (*id.* at 269).

II

This Court has limited the availability of state remedies for libel to those instances in which the complainant can show actual malice and actual damage (*Linn* v. *United Plant Guard Workers of America, supra,* 34 U.S.L.W. 4136, 4139). At least two members of the Court, additionally have pointed out that the First Amendment, made applicable to the states by the Fourteenth Amendment, is absolute in terms, that it constitutionally safeguards freedom of expression regardless of its value, propriety or morality, that state libel laws are an abridgement of this freedom, that the free discussion guaranteed by the First Amendment may not be penalized by judgments in state court libel actions (cf. Douglas J., concurring in *Memoirs of a Woman of Pleasure* v. *Massachusetts, supra,* 34 U.S.L.W. 4236, 4241; Black, J., dissenting in *Rosenblatt* v. *Baer,* 34 U.S.L.W. 4111, 4118; *Linn* v. *United Plant Guard Workers of America, supra,* 34 U.S.L.W. 4136, 4140; *New York Times* v. *Sullivan, supra,* 376 U. S. 254, 293). In the *New York Times* case this Court was openly shocked by the fact of a civil libel judgment for one thousand times the maxi-

mum criminal penalty in Alabama (367 U. S. 276). But here the amount sought, in punitive and alleged general damages only, is two thousand one hundred times the $500 New York penal law maximum fine (*Penal Law, McKinney ed.*, Secs. 1341, 36). And in the penal law (Sec. 1346) a communication qualifiedly privileged "is presumed not to be malicious."[5] As was held in *New York Times* v. *Sullivan* (376 U. S. 276):

> "What a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."

The Appellate Division subverts this rule, even as it has declined to give effect to the rule of the New York Court of Appeals that

> "If the defendant made the statements in good faith, believing them to be true, he will be protected, even if a man of wider reasoning power or greater skill in sifting evidence would have hesitated." (*Cheatum* v. *Wehle, supra,* 5 N. Y. 2d 585, 599, citing *Pecue* v. *West,* 233 N. Y. 316, 322).

This is so, where the purpose of the communications was lawful, as here, even though "strong and plain" words may be used, in the absence of proof of actual malice. Intent makes the libel in such a case, "strong words do not" (*Klinck* v. *Colby,* 46 N. Y. 427, 434 and cases cited).

III

Comparison of the allegations, as regards alleged "interference", in the prior litigation (*Matter of Feuerlicht,*

[5] Sec. 1346 provides: "A communication made to a person entitled to, or interested in, the communication by one who was also interested in, or entitled to make it, or who stood in such a relation to the former as to afford a reasonable ground for supposing his motive innocent, is presumed not to be malicious and is called a privileged communication." See also Rives, C.J., dissenting in *Curtis Pub. Co.* v. *Butts,* 321 F. 2d 702, 726, No. 814, October Term, 1965.

etc. v. *Avery, supra;* 20-26) with the innuendoes alleged in the libel complaint (Appendix, pp. 15-23a incl.) discloses a complete identity of issues in both litigations based upon these very letters which, as stated, were received in evidence at the trial of the prior proceeding along with the libel complaint itself (20-29, 12-13). Since there was complete identity of issue and it has now been judicially determined that petitioner acted under a color of right to protect a fund in which he had a lawful interest, the prior decision and judgment constitute a conclusive collateral estoppel on the question of petitioner's good faith which, as noted, respondent did not even attempt to impeach by the submission of any contrary proofs below (39-70; *Israel* v. *Wood Dolson Co.*, 1 N. Y. 2d 116.) Respondent, as attorney for petitioners in the prior litigation, had an interest therein by reason of his attorney's lien (*New York Judiciary Law*, Sec. 475[6]), thus he is bound by these prior findings and judgment against his clients (*Souffront* v. *Compagnie des Sucreries*, 217 U. S. 475, 486-7; *Restatement: Judgments*, Sec. 84, *Comment b*, p. 391; 1 *Freeman: Judgments* (5th ed.) Sec. 434, p. 948; 2 *Black: Judgments* (2nd ed.) 539; 30A Am. Jur., *Judgments*, Sec. 431, p. 482 and cases; *Good Health Dairy Prod. Co.* v. *Emery*, 275 N. Y. 14, 18). Where, as here, petitioner's conduct has once received judicial approval in the form of a direct adjudication, it cannot thereafter be collaterally attacked in another litigation (See *Lane* v. *Rushmore*, 123 N. J. Eq. 531, 546, 198 A. 872, aff'd 125 N. J. Eq. 310, 4 A. 2d 55, cert. den. 307 U. S. 636).[7] Thus the first requirement, of the

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[6] "From the commencement of an action, special or other proceeding in any court * * * the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim which attaches to a verdict, report, determination, decision or judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; * * *."

[7] Petitioner has been a member of the Bar of this Court since March 1936.

Linn case, *supra*, for state libel action, proof of actual malice in a qualified privilege case, not only is wholly lacking, it was conclusively negatived by the prior decision and judgment on which petitioner is entitled to rely if he is not to be denied due process of law in violation of the Fourteenth Amendment.

Likewise the second requirement of actual damage (*Linn, supra*) is not met by a complaint in astronomical round figures only since it does not seek special damages (*Drug Research Corp.* v. *Curtis Pub. Co.*, 7 N. Y. 2d 435, 441), but where the letters themselves do not impugn respondent's reputation, ability or credit, special damages must be pleaded (*O'Connell* v. *Press Pub. Co.*, 214 N. Y. 352, 358). And in the absence of a showing of actual malice, special damages must be pleaded or the complaint will be dismissed (*November* v. *Time, Inc.*, 13 N. Y. 2d 175, 180 and cases cited). By denying petitioner access to the New York Court of Appeals, without opinion, the Appellate Division has deprived him of the benefit of these controlling rules of law, thus denying him due process.

IV

The test for review on certiorari is not whether the Appellate Division order herein be denominated as "final" under local rules of practice "but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court." (*Department of Banking* v. *Pink*, 317 U. S. 264, 268.) That is abundantly plain from the record here. The Appellate Division has now finally adjudicated, contrary to decisions of this Court, that proof of actual malice is not required to overcome the complete defense of qualified privilege, whether applied to criticism of a public official or in the course of an owner's justified protection of his own property; that a prior binding adjudication that petitioner

acted under color of right and in good faith does not negate the existence of such actual malice, contrary to all principles of collateral estoppel by judgment as laid down in *Souffront* v. *Compagnie des Sucreries, supra,* 217 U. S. 475, 486-7; that a state civil libel action for two thousand one hundred times the maximum state penal provision may be maintained although, by statute, penal prosecution is expressly proscribed in a qualified privilege case and such communication "is presumed not to be malicious" (*N. Y. Penal Law,* Sec. 1346, *supra*), despite this Court's declaration that a state may not accomplish in the civil law of libel what is constitutionally prohibited in its criminal law, since libel has no "talismanic immunity from constitutional limitations" (376 U. S. 269); that triable "issues" exist as to the "extent" of the prior adjudication, although it is axiomatic that the scope, extent and effect of a legal decision are solely questions of law;[8] that this suit may be maintained in the absence of any claim of actual special damage although where malice is not shown and special damages are not claimed, the complaint must normally be dismissed.

These federal Constitutional questions were directly and explicitly raised under Point II in petitioner's brief in the Appellate Division on his motion for leave to go to the Court of Appeals (Appendix 4-5a; *Lynum* v. *Illinois,* 368 U. S. 908). Petitioner could not reasonably anticipate that the Appellate Division, by its affirmance without opinion, would not apply the controlling decisions of the New York Court of Appeals, herein set forth. Indeed, he could not even anticipate reasonably that he would be denied review by that Court in view of the previous practice in identical situations, heretofore set forth, long established in the Appellate Division, Second Department

[8] One can imagine, for example, the "extent" that a rural Mississippi jury might give to *Brown* v. *Board of Education,* 347 U. S. 483, if this question was submitted to them.

(*Shapiro* v. *Health Ins. Plan, supra,* 7 N. Y. 2d 56; *Sheridan* v. *Crisona, supra,* 14 N. Y. 2d 108). Thus it is plain that he has been denied the further state court review that he would have been entitled to by the Second Department under these controlling decisions, through no fault of his own; that the First Department's refusal to consider the federal Constitutional questions, seasonably presented at the first available opportunity, has denied petitioner due process of law and that such questions have been properly raised (see *Brinckerhoff-Faris Co.* v. *Hill,* 281 U. S. 673, 677-8; *Great Northern R. Co.* v. *Sunburst Oil Co.,* 287 U. S. 358, 367; *Missouri* v. *Gehner,* 281 U. S. 313, 320; *Ohio* v. *Akron Park District,* 281 U. S. 74, 79; *Saunders* v. *Shaw,* 244 U. S. 317, 320; *Cole* v. *Arkansas,* 333 U. S. 196, 200). Plainly local procedure can not be used to stifle a federal claim or evade a vindication of federal rights (*Davis* v. *Wechsler,* 263 U. S. 22, 24-5).

The question thus is now ripe for adjudication in this Court, even though a trial may still be technically permissible under the local state practice (*Pope* v. *Atlantic Coast Line R. Co.,* 345 U. S. 379, 382, *Richfield Oil Corp.* v. *State Board,* 329 U. S. 69, 72; *Construction Workers* v. *Curry,* 371 U. S. 542, 550; *Mercantile N. Bank* v. *Langdreau,* 371 U. S. 555, 558).

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

April 22, 1966.

RICHARD STEEL,
Attorney for Petitioner,
61 Broadway,
New York, N. Y. 10006.